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No. 08-388

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In The

Supreme Court of the United States

THE CITY OF PHILADELPHIA, PENNSYLVANIA,

Petitioner,

v.

RICHARD LAWRENCE, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondents reconcile the Third Circuit's erroneous determination – that the City's Fire Service Paramedics ("FSPs") are not subject to the partial overtime exemption of the Fair Labor Standards Act ("FLSA") for employees in fire protection activities – with other circuit decisions, particularly the decision of the Eleventh Circuit in *Huff v. DeKalb County*, 516 F.3d 1273 (11th Cir. 2008) ("*Huff*") only by mischaracterizing those decisions and the record.

Respondents ignore the *Huff* Court's holding that "responsibility" for fire suppression requires no actual performance of fire suppression duties, a definition broader than the Ninth Circuit's in *Cleveland v. City of Los Angeles*, 420 F.3d 981 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006), and one completely inconsistent with the Panel majority's holding in this case. Furthermore, the Third Circuit Panel majority went beyond the Ninth Circuit's test in *Cleveland* by requiring the *actual* performance by FSPs of Firefighter duties on some unspecified but regular basis. As a result, it created a clear conflict with *Huff*, adopted an interpretation of *Cleveland* incompatible with *Huff* under these facts, and hopelessly confused the law on an issue of great importance as well as enormous potential financial exposure to municipal and state governments.

Respondents also ignore and misstate ample record evidence of responsibility for and performance by the City's FSPs of fire suppression activities in

order to distinguish themselves from the group of fire paramedics in *Huff* who, like the City's FSPs, were assigned to the performance of emergency medical services but on firegrounds also operated, under policies nearly identical to those of the City, in a deep reserve capacity to firefighters. Far from the "single function" ambulance drivers that Respondents attempt to portray themselves, the record compels the conclusion, under a *Huff* analysis, that the FSPs possess sufficient authority and responsibility for fire suppression despite their primary mission of providing emergency medical care at firegrounds and elsewhere. The Third Circuit's contrary decision misread the FLSA and is flatly inconsistent with *Huff*.

A. There Is a Clear Conflict Between the Panel Majority's Decision and the Eleventh Circuit's Decision in *Huff*, Which Itself Cannot Be Reconciled with *Cleveland* on the Facts of This Case.

Central to Respondents' Opposition is its denial of any conflict between the Third Circuit Panel majority's decision in this case, in which the Court purported to follow *Cleveland*, and the Eleventh Circuit's analysis in *Huff*. With respect to employees like the City's FSPs, however, who are more than "single function" ambulance drivers but not completely "dual function" firefighter/paramedics, the conflict is both patent and irreconcilable.

In *Cleveland*, the Ninth Circuit defined "responsibility," as did the Panel majority below, as "some real obligation or duty to" engage in fire suppression. 420 F.3d at 990. The Court stated that "[i]f a fire occurs, it must be their [*i.e.*, the paramedic's] job to deal with it." *Id.* Because in *Cleveland* the paramedics were not regularly dispatched to fire scenes, were not required to wear protective gear at fires nor equipped with breathing apparatuses, could not be ordered to engage in fire suppression, and could not be disciplined if they refused, the Court concluded that they had no "real obligation or duty," and that it was not "their job," to engage in fire suppression. *Id.*

Expressly adopting this definition from *Cleveland*, the Third Circuit Panel majority similarly held that it was not the FSPs' "job" to perform fire suppression activities. The Panel majority, however, unlike the Ninth Circuit, required the City to demonstrate that its FSPs were "dual function paramedics who still operate as firefighters part of the time." App. 39a.

In contrast, the Eleventh Circuit in *Huff*, after first distinguishing its paramedics from those in *Cleveland* as subject to orders to engage in fire suppression, took pains to further clarify "responsibility" as particularly relevant to this case. The Court in *Huff* reasoned that, since the plaintiffs in its case *were* required to engage in fire suppression if ordered, it was indeed their "responsibility" to put out fires even if they rarely or *never* were called upon to do so. 516 F.3d at 1281. In construing the statute, the

Eleventh Circuit emphasized that "'[r]esponsibility to engage in fire suppression' must mean something other than 'is engaged in the prevention, control, and extinguishment of fires.'" *Id.* In fact, the phrase did not imply "any actual engagement in fire suppression," and could be satisfied by a "forward-looking, affirmative duty or obligation that an employee may have at some point in the future." *Id.*

There were two groups of paramedics employed by the fire department in the *Huff* case. One of those groups, the NPQ I plaintiffs, was, like the City's FSPs, provided a lesser degree of training in fire suppression and assigned to work only in medic vans which carried turnout gear and breathing apparatuses but no other fire suppression equipment.[1] The NPQ I plaintiffs were *never*, as a matter of policy, ordered to engage in fire suppression. *Id.* at 1274-75. Nevertheless the Eleventh Circuit unequivocally held that these NPQ I plaintiffs were sufficiently "responsible" for engaging in fire suppression within the meaning of 29 U.S.C. § 203(y).

The Third Circuit Panel majority's decision thus plainly conflicts with *Huff*. Like the NPQ I plaintiffs, the City's FSPs received more than the minimum

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[1] The second group, the NPQ II plaintiffs, received more advanced fire suppression training, had primary responsibility for both firefighting and medical services, and was assigned interchangeably to fire engines and medic vans. *Id.* at 1275-76.

training required of firefighters in their state,[2] are assigned only to medic vehicles and not to fire engines, and as a matter of policy are dispatched to perform advanced emergency medical services. Nevertheless, in contrast to the Panel majority, the Eleventh Circuit recognized that when dispatched to firegrounds such paramedics still are "responsible to engage in fire suppression activities" if ordered, and that the unlikelihood of their being so ordered does "not make the responsibility less real." *Id.* at 1282. There is simply no way that the Third Circuit Panel majority's decision and *Huff* can be reconciled, nor any interpretation of *Cleveland* consistent with *Huff* under the facts of this case.

B. To Blur The Conflict, Respondents Misstate the Record.

Respondents choose to divert the Court's attention from the foregoing clear conflict by focusing on the facts of this particular case, and arguing that the FSPs here, like the FSPs in *Cleveland*, actually had *no* responsibility for fire suppression. Respondents distort the record, as shown below, but, critically, this record dispute is of no moment – the Third Circuit's opinion unquestionably holds that no

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[2] Also like the FSPs, the NPQ I plaintiffs in *Huff* did not possess enough advanced training to be classified as Firefighters in DeKalb County. *See Huff v. DeKalb County*, 2007 U.S. Dist. LEXIS 6398, at *12 n.8 (N.D. Ga., Jan. 30, 2007), *aff'd*, 516 F.3d 1273 (11th Cir. 2008).

paramedic falls within the § 203(y) definition unless he or she actually fights fires as part of his or her job. Thus, the record dispute suggested by Respondents – they say FSPs have no authority whatsoever to fight fires, while we say they have authority, just not regularly exercised – is irrelevant under the Third Circuit's rule, as, under either reading of the record, the Third Circuit holds that the exemption does not apply. That holding is inconsistent with *Huff* and inconsistent with the language and intent of the FLSA.

To blur the conflict, Respondents avoid or mischaracterize facts which would detract from their portrayal of themselves as "single function" paramedics whose only job is to "staff ambulances." Opp. 1-2. Thus, they misleadingly claim, in an effort to align the facts with those in *Cleveland*, that FSPs "go to fire scenes only rarely." Opp. 2. The record, however, plainly states that FSPs are summoned to *all* confirmed fire scenes in the City of Philadelphia.[3] C.A. App. 1776, 29-32, 2094 (Department procedures specify that medic units are to be dispatched to every confirmed fire and hazardous materials incident). If FSPs in any sense respond to fire scenes relatively "rarely," that is only because the number of fires in Philadelphia, as in most municipalities, has dropped

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[3] Because the Third Circuit held the City liable on cross-motions for summary judgment, all facts must be considered in the light most favorable to the City upon appeal. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

significantly in recent years so that confirmed fire scenes are comparatively few; in contrast, calls for emergency medical services have increased sharply over the same period. Philadelphia Fire Department Annual Report 2004, pp. 7, 64, available at https://secure.phila.gov/fire/docs/annualreport04.pdf.

In an effort to distinguish their duties from those found subject to the partial overtime exemption in *Huff*, Respondents erroneously (and without citation) claim that "[a]ny officer ordering an FSP to assist with fire suppression efforts would have been disciplined." Opp. 3. To the contrary, the record evidences that FSPs can be ordered by superior officers to perform fire suppression activities, have performed such activities on firegrounds, and would be subject to discipline if they disregarded such orders. *See, e.g.*, C.A. App. 139-93 (FSP MacMillan testifying that fire lieutenant asked him to help feed hose line into a building; he would have been reported had he disobeyed); C.A. App. 1438 (FSP Boyes testifying that "I was ordered by a chief to help out with hose line"); C.A. App. 1351 (FSP Brooks testifying that chiefs have asked him to pull hose line, and "[w]hen the chief orders me, I do it"). There is no evidence that any such chief was ever disciplined for issuing such orders. And far from being disciplined themselves for engaging in fire suppression, FSPs have been commended for their heroic efforts.[4]

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[4] *See* City's Petition at 11 n.10. They also have been favorably evaluated. FSP Brooks, for example, testified that a

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Respondents continuously oversimplify and denigrate their role at fire scenes. They claim, for example, that their commendations were solely "for medical tasks." Opp. 4 n.3. The record instead reflects extensive teamwork between Firefighters and FSPs at fire scenes, with many of the "medical tasks" for which FSPs were honored actually rescue or evacuation tasks often performed by Firefighters. Thus, FSPs Gran and Savarese were commended for running into a building to relieve shorthanded Firefighters of a fire victim (C.A. App. 2227, 1617); FSPs Klein and Cartagena were honored for evacuating people and attempting to isolate and extinguish a mattress fire (C.A. App. 2139); FSPs Glynn and Amaker were commended for rescuing an elderly man from the balcony of a fire-involved apartment (C.A. App. 2316); and FSP Bloomfield received a commendation for pulling a semiconscious victim from a burning car. C.A. App. 2306. FSP Mulderig carried a disabled man from a wheelchair down a ladder in a fire-bombed house. C.A. App. 1983-84. Such rescue and evacuation efforts defy Respondents' attempts to pigeonhole the work of FSPs at fires as purely "medical." FSPs also are called on to enter still-smoldering buildings to

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performance evaluation comment commending him for his "enthusiasm and willingness to help on the fire ground" referred to his pulling hose line, helping with hydrants, and getting water. C.A. App. 1342. *See also* C.A. App. 1452 (FSP Boyes praised in performance evaluation for "exemplary" enthusiasm on fireground related to stretching hose line, hooking up hydrants, and holding ladders).

pronounce fire victims dead or to help carry victims out (C.A. App. 1280, 1390, 1450, 1748, 2002), or to begin treatment of a victim still being extricated. C.A. App. 1391, 1751. Sometimes their "medical treatment" begins with actually extinguishing their patient's still-burning clothing. C.A. App. 1991, 1993.

Respondents also unfairly conflate the City's managerial judgment that dual function firefighter/paramedics are unsuited to the City's needs with the complete exclusion of FSPs from any fire-related activity. Respondents thus find damning a statement by former Fire Commissioner Hairston choosing to keep the primary missions of FSPs and Firefighters separate. Opp. 15. Not only do Respondents omit Commissioner Hairston's preceding statement that he has "never looked at it as though it was a line in the sand" because emergency responders inevitably are called upon to perform activities at a fireground (C.A. App. 1186), but also his testimony that he was not negating either the fire training received by FSPs nor their responsibility to engage in fire suppression activities when needed.[5] C.A. App. 1121-23. In fact,

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[5] The impossibility of categorizing the work of FSPs at fire scenes as solely medical led former Commissioner Hairston to state: "I think that once we decided to consciously call them fire service paramedics I think that, in itself, speaks for the fact that we expect you to go to fire grounds, and we expect you to learn how to be safe on firegrounds, and we expect you to be able to engage, to some degree, in activities *other than just the medical aspects of the job*." C.A. App. 1225 (emphasis added). In a similar vein, Commissioner Hairston testified: "We call them fire service

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both current Commissioner Ayres and former Commissioner Hairston expressly testified that they authorized FSPs to engage in fire suppression and that FSPs were responsible for fire suppression. C.A. App. 2078 (Ayers: "Due to the nature of emergency response work, I have authorized fire service paramedics to engage in fire suppression on firegrounds if needed and as directed by an Incident Commander. This authorization requires that the fire service paramedics receive training in fire suppression . . . designed to ensure that fire service paramedics can provide fire suppression services if called upon under emergency conditions by their incident commander or by other circumstances."); 2098 (Hairston).[6] The record thus dispels Respondents' claim that they are solely single-function providers of medical services, a finding essential to any reconciliation of the Panel majority's decision with *Huff*.[7] Because there is no material distinction

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paramedics. We train them to handle fire ground scenarios. So I think anybody that thinks that we don't engage them in some way in firefighting is being disingenuous, at best." C.A. App. 1227.

[6] The FSPs' Code of Conduct, signed by each FSP cadet, acknowledges this responsibility. C.A. App. 2166.

[7] The Third Circuit Panel majority appears to have based its analysis of *Huff* on facts accurate solely as to the NPQ II plaintiffs and also to have understated the similarities of the City's FSPs and the NPQ I plaintiffs. However, even had the Third Circuit accepted as true all of the City's facts as stated in this Petition and Reply, its own ruling in this case would not have differed because the Third Circuit's interpretation of § 203(y) allows the partial exemption only as to personnel

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between the City's FSPs and the NPQ I plaintiffs in *Huff* found eligible for the partial overtime exemption, the diametrically opposite results in the Panel majority's opinion and in *Huff* demand reconciliation by this Court.

CONCLUSION

The Third Circuit Panel majority's misconstruction of the FLSA represents a direct circuit conflict on an issue of critical importance to the City and other similarly-situated municipalities, one which threatens to wreak havoc on their already overtaxed municipal finances. For all the reasons stated in this Reply Brief and those in the Petition, the City respectfully submits that its Petition for a Writ of Certiorari should be granted.[8]

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actually assigned to fire engines and firefighting duties at least part of the time.

[8] Respondents briefly argue that this Court should decline review either because Congress or the Department of Labor might clarify the exemption, or because of alleged lack of finality. Opp. 28-29. Respondents do not suggest that there is any prospect of Congressional action. The Department of Labor in fact has issued proposed regulations, but, other than favorably citing to *Huff* and *McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006), in finding that the "80/20" rule has been supplanted, in no way proposes to clarify the "responsibility" issue. *See* Updating Regulations Issued Under the Fair Labor Standards Act, 73 Fed. Reg. 43654, 43658 (2008) (to be codified at 29 C.F.R. pt. 553) (proposed July 28, 2008). Finally, "[c]ases in the courts of appeals may be reviewed by the Supreme Court by

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Respectfully submitted,

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. . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of a judgment or decree." 28 U.S.C. § 1254(1). This Court has not hesitated to review cases where they involve an issue "fundamental to the further conduct of the case." *See, e.g., Land v. Dollar*, 330 U.S. 731, 734 n. 2 (1947), quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). *See also School Bd. v. Arline*, 480 U.S. 273, 277 (1987) (review of appellate court's reversal and remand of district court's dismissal).